

Misconduct justifying a dismissal: Articulation between the employee's freedom of expression and sexist comments

Although employees enjoy, within and outside the company, the right to freedom of expression, sexist comments made by an employee outside of his/her working time can justify a dismissal for serious misconduct, as recently ruled by the *Cour de Cassation* (French Supreme Court) in a decision handed down on April 20, 2022.

On April 20, 2022, the *Cour de Cassation* issued a decision concerning the dismissal for serious misconduct by an employer following sexist comments made by one of its employees. In its decision, the *Cour de Cassation* struck a balance between compliance with the provisions of the employment contract and employees' freedom of expression^[1].

The decision recalls that, except in case of abuse, all employees enjoy the right to freedom of expression within and outside the company. However, the employer may restrict the employee's freedom of expression if these restrictions are justified by the nature of the task to be performed by the employee and are proportionate to the purpose to be achieved.

As such, whenever an employee violates the restrictions set by the employer, a disciplinary sanction, up to and including dismissal for serious misconduct, may be imposed.

In the case at hand, the dismissal of the employee for serious misconduct was justified by the combination of several elements.

Firstly, the employee's breach of a contractual obligation:

1 - The employee's employment contract included a clause by which the employee acknowledged that he had read and would comply with all the provisions of the company's code of ethics, in particular "*Respect for human rights*" which constituted one of the major characteristics of the spirit that ought to drive the

company's actions.

2 - A clause in the employment contract also provided that any violation of the above-mentioned principle by the employee, in particular because of his duties as a TV host, would constitute a serious misconduct.

Secondly, the circumstances surrounding the employee's sexist comments:

3 - Indeed, the employee had made sexist comments in a context where several events had recalled the need to fight domestic violence and gender discrimination.

4 - The employee, host of a TV show, had made sexist comments during a program in which he was a guest and which was broadcast live at prime time.

5 - The employee had persisted in his behavior since he had repeated sexist comments during his own TV show.

6 - The employer considered that the sexist comments were "*likely to permanently tarnish the company's image*" and demanded that the employee be replaced "*without delay*".

Because of all these elements, judges considered that the dismissal for serious misconduct based on the employee's violation of a clause in his employment contract was justified insofar as the dismissal pursued the legitimate purpose of combating gender discrimination and domestic violence, and that of protecting the employer's reputation and rights.

Consequently, for the *Cour de Cassation*, the termination of the employment contract was not disproportionate and did not excessively infringe on the freedom of expression, taking into account (i) the employee's repeated comments, which reflected a trivialization of violence against women, and (ii) the potential impact of these comments on the employer's business interests.

[1] Labor Chamber of the *Cour de Cassation*, April 20, 2022, No. 20-10.852

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